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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

ELYAS RAEISI-NAFCHI,

Plaintiff and Respondent,

v.

ERIK HOVSEPIAN,

Defendant and Appellant.

B285650

(Los Angeles County
Super. Ct. No. BC602240)

APPEAL from a judgment of the Superior Court of Los Angeles County, Terry A. Green, Judge. Affirmed.

Erik Hovsepien, in pro. per., for Defendant and Appellant.

Law Offices of Lee E. Burrows, Lee E. Burrows, Jill A. Thomas, and Kristina Edrington for Plaintiff and Respondent.

I. INTRODUCTION

Defendant Erik Hovsepien appeals from a judgment following a court trial. Hovsepien contends the trial court abused

its discretion by dismissing his cross-complaint and granting plaintiff Elyas Raeisi-Nafchi's motion in limine. We conclude Hovsepian has failed to demonstrate prejudicial error and therefore affirm.

II. BACKGROUND

A. *Complaint and Demurrer*

On November 24, 2015, Raeisi-Nafchi filed a complaint against Hovsepian for: (1) breach of oral agreement; (2) unjust enrichment; (3) common count; (4) promissory fraud; and (5) breach of the covenant of good faith and fair dealing. Raeisi-Nafchi alleged that on or about September 26, 2014, he loaned Hovsepian \$150,000, which Hovsepian agreed to—but did not—repay within 45 days.

Hovsepian demurred to the complaint. On June 2, 2016, the trial court overruled the demurrer as to the first, second, and third causes of action, but sustained the demurrer as to the fourth and fifth causes of action, with leave to amend in 20 days. On June 23, 2016, Raeisi-Nafchi notified the court of his intent to not amend.

On March 22, 2016, the court scheduled trial to begin on July 24, 2017. On July 10, 2017, the court conducted the final status conference.

B. *Late Identification of Documents and Witnesses*

On July 10, 2017, Hovsepian's counsel handed Raeisi-Nafchi's counsel an exhibit list, which referenced a document

called “Invoices for goods produced,” and also handed counsel a list of witnesses. Hovsepian, however, had not produced any documents or identified a number of the people on the witness list during the course of discovery, which was closed on June 24, 2017.

On July 17, 2017, and July 18, 2017, Hovsepian’s counsel sent Raeisi-Nafchi’s counsel two emails attaching documents that had never been produced during the course of discovery.

C. Answer and Cross-Complaint

On July 17, 2017, seven days before trial was to commence, Hovsepian filed an answer, denying every allegation in Raeisi-Nafchi’s complaint and asserting 16 affirmative defenses, including a contention that Hovsepian was entitled to an offset for money that Raeisi-Nafchi owed Hovsepian.¹

Also on July 17, 2017, Hovsepian filed a cross-complaint for: (1) breach of oral agreement and (2) common count for open book account. Hovsepian alleged that he and Raeisi-Nafchi had entered into an oral contract in which Hovsepian agreed to sell Raeisi-Nafchi high-end items including Persian rugs and televisions. Hovsepian shipped to Raeisi-Nafchi approximately \$200,000 worth of items on account. On September 16, 2014, Raeisi-Nafchi paid Hovsepian \$150,000, which was applied to the balance due. Thus, Raeisi-Nafchi still owed Hovsepian \$50,000, which Raeisi-Nafchi failed to pay. Hovsepian sought damages in

¹ Pursuant to rule 3.1320(j)(2) of the California Rules of Court, and the Code of Civil Procedure, the answer was due by July 5, 2016.

the amount of \$50,000, as well as costs, interest, and attorney fees.

D. *Motions to Strike and Motion in Limine*

On July 24, 2017, Raeisi-Nafchi filed an ex parte application to strike Hovsepian's answer. Raeisi-Nafchi also filed an application to strike or dismiss Hovsepian's cross-complaint pursuant to Code of Civil Procedure section 581, subdivision (g).² Raeisi-Nafchi asserted that he was prejudiced by Hovsepian's late filing of the cross-complaint a week before trial was set to begin. Raeisi-Nafchi contended that Hovsepian acted in bad faith because Hovsepian knew about his cause of action since 2014, but did not assert it until July 17, 2017. Raeisi-Nafchi also asserted that Hovsepian acted in bad faith because he did not notify Raeisi-Nafchi or the trial court of his intention to file the cross-complaint during the final status conference held on July 10, 2017.

Also on July 24, 2017, Raeisi-Nafchi filed a motion in limine to exclude 142 pages of documents and three witnesses that Hovsepian wished to present at trial. Raeisi-Nafchi described the documents, half of which were written in Farsi and not translated into English, as reminders of payment, fax cover sheets, and other documents that supported Hovsepian's contention that the \$150,000 that Raeisi-Nafchi gave to Hovsepian was not a loan, but a payment for amounts due. Counsel explained in a declaration that in March 2016, Raeisi-Nafchi had served: (1) form interrogatories; (2) special

² Further statutory references are to the Code of Civil Procedure.

interrogatories; and (3) a request for production of documents, to which the documents and witnesses that were the subjects of the motion were responsive. In April 2016, Hovsepian responded to each of these discovery requests, but produced no documents, and disclosed three witnesses, but not the witnesses that Hovsepian now wished to call at trial. On January 11, 2017, Raeisi-Nafchi served Hovsepian with supplemental interrogatories and requests for production of documents to supplement any of Hovsepian's previous responses. Hovsepian did not respond and produced no documents.

E. *Hearing on Motions*

On July 24, 2017, the trial court held a hearing on the ex parte applications to strike or dismiss the answer and the cross-complaint, as well as the motion in limine. Hovsepian's trial counsel explained the delay in filing the answer and cross-complaint: "I subbed in in this case a few months ago. And . . . roughly two weeks ago, as I was getting ready, I discovered that my predecessor never filed an answer or a cross-complaint."

The trial court indicated that it would allow the late filed answer but was inclined to strike the cross-complaint: "I'm not going to default . . . your client [by striking the answer] because you've been taking part in this litigation since the beginning, but what concerns me is the cross-complaint. You know, it's one thing to say not guilty. It's another thing to take up the sword on the day of trial, have him [Raeisi-Nafchi] defend it. I mean how is he supposed to defend this when it has never been pending before?" The court asked why Hovsepian was filing the cross-

complaint at “the eleventh-and-a-half hour. Where has this been during this litigation? You substantially changed the case.”

Hovsepian’s counsel agreed that the cross-complaint was filed late, acknowledged Raeisi-Nafchi’s argument about prejudice, but stated that he did not have a problem permitting Raeisi-Nafchi to prepare a defense. The trial court interpreted counsel’s statement as a request for a continuance, and stated: “No. This is—we’re here for trial. [¶] . . . [¶] You inherited a file, and it’s certainly not your fault that the ball was dropped, but—I’m not going to default your guy. He has a right to a defense. But as far as cross-complaint, no, I’m not—I’m going to strike the cross-complaint.”

Next, the trial court considered Raeisi-Nafchi’s motion in limine. Regarding the documents, Raeisi-Nafchi’s counsel repeated that they were responsive to discovery requests propounded in 2016, but had not previously been produced. The trial court asked the rhetorical question, “What’s the point of having discovery rules if they’re ignored?” It then asked Hovsepian’s counsel, “How does this happen?”

Counsel responded, “I don’t know, your Honor,” and did not dispute Raeisi-Nafchi’s counsel’s description of the procedural history.³ The trial court granted the motion to exclude the documents from trial.

³ Specifically, counsel stated, “I don’t know, your Honor. All I know is, when counsel and my predecessor had agreed to postpone my client’s deposition—and last week, part of the issue was the companion case. We were in trial in that one. And once that trial concluded, we scheduled my client’s deposition, which was a couple of weeks ago. The documents that I received were responsive to the notice of deposition were produced as fast as I

Regarding the three previously undisclosed witnesses, Raeisi-Nafchi's counsel explained that he had propounded discovery requests for the identity of witnesses who could confirm Hovsepian's denial that the \$150,000 represented a loan, and Hovsepian had not disclosed the identity of the witnesses. Hovsepian's counsel agreed that Raeisi-Nafchi's counsel's recitation of facts was accurate. "They were not disclosed. I agree with that. I'm not challenging that." The trial court noted that Hovsepian's conduct "flies in the face of the civil discovery statutes. [¶] So if we all agree they were asked for and if we all agree the names weren't turned over, then I'll grant the motion, they will not be called as witnesses."

F. *Trial*

Because Hovsepian was ill, the trial court continued the trial to July 31, 2017.

1. Raesi-Nafchi

Raesi-Nafchi testified that on September 26, 2014, he gave Hovsepian a \$150,000 check in the lobby of a hotel. The payment represented a loan. A third party, Armond Avakian, was present at the time Raesi-Nafchi provided Hovsepian the check.

could on the day of the deposition, and that's all I can say. I don't know what else beyond that to say."

Counsel further explained that at the close of the companion case, the trial court found "Hovsepian liable to the Raeisi Group for fraud, conversion, and breach of fiduciary duty."

Raeisi-Nafchi testified about the circumstances under which he gave Hovsepian the check. Hovsepian had stated he owed money for taxes and asked Raeisi-Nafchi to “please help.” When Raeisi-Nafchi asked Hovsepian about repayment, Hovsepian first agreed to repay the loan in 45 days, and then later agreed to repay the loan in 60 days. Hovsepian did not repay the loan.

Raeisi-Nafchi also testified that he had previously purchased rugs from Hovsepian and moved into evidence an exhibit, which he described as records of wire transfer payments and receipts for Raeisi-Nafchi’s purchase of rugs from Hovsepian. According to Raeisi-Nafchi, Hovsepian did not send Raeisi-Nafchi rugs until after Raeisi-Nafchi provided payment for them. At the time that Raeisi-Nafchi provided the \$150,000 check to Hovsepian, he did not owe Hovsepian any money.

2. Armond Avakian

Armond Avakian had been friends with Hovsepian for 30 years and each served as best man at the other’s wedding. Hovsepian introduced Avakian to Raeisi-Nafchi in 2012, so that Avakian could assist Raeisi-Nafchi in business dealings. Avakian was present when Hovsepian told Raeisi-Nafchi that he owed money for taxes, and asked Raeisi-Nafchi for \$150,000. Hovsepian and Raeisi-Nafchi went back and forth on when Hovsepian would repay the money, and discussed that Hovsepian would repay Raeisi-Nafchi in either 45 days or two months, “something like that.” It was Avakian’s understanding that at the time Raeisi-Nafchi provided the check to Hovsepian, Raeisi-Nafchi owed Hovsepian approximately \$40,000.

3. Hovsepian

Hovsepian testified that beginning in 2005, Raeisi-Nafchi purchased rugs from Hovsepian. Raeisi-Nafchi had purchased approximately \$700,000 of rugs from Hovsepian. On most occasions, Hovsepian sent the rugs to Raeisi-Nafchi before being paid for them. Raeisi-Nafchi always sent payments to Hovsepian by wire transfer.

On one occasion, Raeisi-Nafchi gave Hovsepian a check for \$150,000. Hovsepian did not ask Raeisi-Nafchi for this money and the funds did not represent a loan. Instead, Raeisi-Nafchi and Hovsepian were in a car when Raeisi-Nafchi asked Hovsepian whether Hovsepian knew how much money Raeisi-Nafchi owed him. Hovsepian responded that he did not know. Raeisi-Nafchi then asked whether \$150,000 was enough. The two men began joking, and Hovsepian told Raeisi-Nafchi, “If you owe me, we do this; if I owe you, we do this.” According to Hovsepian, someone named Masis Ismael (one of the late disclosed witnesses who was excluded from trial), was present during the conversation.

Also according to Hovsepian, in April 2014,⁴ Raeisi-Nafchi owed Hovsepian more than \$150,000 for Raeisi-Nafchi’s purchase of rugs, but Hovsepian did not know precisely how much. Hovsepian never agreed to repay Raeisi-Nafchi \$150,000.

On cross-examination, Hovsepian stated that he did not recall signing a declaration dated May 18, 2016. Raeisi-Nafchi’s counsel, without objection, read a portion of this declaration into the record, which stated, “In mid to late September 2014, I

⁴ The relevance of the April 2014 date is not clear from the record.

explained to [Raeisi-Nafchi], that in [sic] many financial obligations that I need to meet and did not have the necessary funds. He asked me how much I needed. And I told him \$150,000.” Hovsepian maintained that he did not recall signing this declaration and if he had signed it, he did so without paying attention to what it stated. Hovsepian maintained that Raeisi-Nafchi offered him the check and that Hovsepian “did not ask for any of this.”

4. Decision

Following trial, the court found in favor of Raeisi-Nafchi and against Hovsepian. The court concluded that Raeisi-Nafchi and Avakian were credible witnesses and Hovsepian was not. It stated that Hovsepian had engaged in “double talk” and said “things that didn’t make any sense.” The court concluded that Hovsepian owed Raeisi-Nafchi \$150,000.

III. DISCUSSION

A. *Hovsepian Was Not Prejudiced by the Trial Court’s Striking or Dismissal of the Cross-Complaint*

Hovsepian contends that the trial court erred by granting Raeisi-Nafchi’s ex parte application to strike or dismiss his cross-complaint. Even assuming for ease of analysis that the trial court erred in striking or dismissing the cross-complaint, we affirm because Hovsepian has failed to demonstrate resulting prejudice.

An appealed judgment or order is presumed correct. (*Jameson v. Desta* (2018) 5 Cal.5th 594, 608-609.) An appellate court will reverse or modify an appealed judgment or order only for prejudicial error. (*F.P. v. Monier* (2017) 3 Cal.5th 1099, 1107-1108; see *Gherman v. Colburn* (1977) 72 Cal.App.3d 544, 560 [applying prejudicial error rule to denial of motion to file compulsory cross-complaint under § 426.50].) On appeal, the appellant has the burden of demonstrating that “it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.” (*Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 800.)

As Raeisi-Nafchi argues in his respondent’s brief, Hovsepien has failed to assert in his opening brief that any error in dismissing the cross-complaint was prejudicial. Moreover, Hovsepien did not file a reply brief to address prejudice. ““When an appellant fails to raise a point, or asserts it but fails to support it with reasoned argument and citations to authority, we treat the point as waived.”” (*Cahill v. San Diego Gas & Electric Co.* (2011) 194 Cal.App.4th 939, 956; accord, *Meeks v. AutoZone, Inc.* (2018) 24 Cal.App.5th 855, 876.) Thus, we conclude that Hovsepien has waived, or forfeited,⁵ his challenge to the trial court’s dismissal of the cross-complaint and affirm on that basis.

⁵ “Over the years, cases have used the word [waiver] loosely to describe two related, but distinct, concepts: (1) losing a right by failing to assert it, more precisely called forfeiture; and (2) intentionally relinquishing a known right. ‘[T]he terms “waiver” and “forfeiture” have long been used interchangeably. The United States Supreme Court recently observed, however: “Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the ‘intentional relinquishment or abandonment of a known right.’

Alternatively, our independent review of the record demonstrates that Hovsepian has not been prejudiced. In his cross-complaint, Hovsepian sought \$50,000 in damages, contending that the \$150,000 he received from Raeisi-Nafchi represented a partial payment on a \$200,000 debt that Raeisi-Nafchi owed Hovsepian. Hovsepian presented this same theory as a defense at trial. Had the court credited Hovsepian's account and found no liability, then Hovsepian would have a stronger argument for finding prejudice, that is, Hovsepian could argue that he should have been entitled to collect the additional \$50,000. But the trial court expressly rejected Hovsepian's position and concluded that the \$150,000 check did not represent a repayment on monies due (as Hovsepian testified) but represented a loan (as Raeisi-Nafchi and Avakian testified), which Hovsepian had not repaid. Thus, on this record, Hovsepian cannot demonstrate any reasonable probability that he would have achieved a more favorable result absent the trial court's assumed error.

B. *Trial Court did not Err by Granting Motion in Limine*

Hovsepian next contends that the trial court erred by granting Raeisi-Nafchi's motion in limine. We review the trial court's ruling on motions in limine to exclude evidence for an abuse of discretion. (*Osborne v. Todd Farm Service* (2016) 247 Cal.App.4th 43, 50-51; *R.S. Creative, Inc. v. Creative Cotton, Ltd.* (1999) 75 Cal.App.4th 486, 496.) Because on appeal we presume

[Citations.]” (*United States v. Olano* [(1993) 507 U.S. 725, 733 . . .].)’ (*People v. Saunders* (1993) 5 Cal.4th 580, 590, fn. 6)” (*Cowan v. Superior Court* (1996) 14 Cal.4th 367, 371.)

the appealed judgment or order is correct, we will imply all findings in support of the appealed judgment or order that are supported by substantial evidence. (*Fair v. Bakhtiari* (2011) 195 Cal.App.4th 1135, 1148-1149.)

Hovsepian does not dispute that he did not comply with his discovery obligations. Instead, he contends that the trial court “never undertook an analysis of the merits of the motion.” According to Hovsepian, because the court did not expressly find he abused the discovery process or willfully failed to comply with his discovery obligations, we must reverse the judgment. We disagree.

“One of the principal purposes of discovery was to do away “with the sporting theory of litigation—namely, surprise at trial.”” (*Emerson Electric Co. v. Superior Court* (1997) 16 Cal.4th 1101, 1107; see §§ 2023.010 [misuse of discovery process includes “[f]ailing to respond or to submit to an authorized method of discovery” and “[m]aking an evasive response to discovery”], and 2023.030, subd. (c) [“The court may impose an evidence sanction by an order prohibiting any party engaging in the misuse of the discovery process from introducing designated matters in evidence”].) “[E]xclusion of a party’s witness for that party’s failure to identify the witness in discovery is appropriate only if the omission was willful or a violation of a court order compelling a response.” (*Mitchell v. Superior Court* (2015) 243 Cal.App.4th 269, 272; see also *Karlsson v. Ford Motor Co.* (2006) 140 Cal.App.4th 1202, 1215 [“violation of a discovery order is not a prerequisite to issue . . . evidentiary sanctions when the offending party has engaged in a pattern of willful discovery abuse that causes the unavailability of evidence”].)

Here, substantial evidence supports the trial court's implied finding that Hovsepian's failure to produce documents and identify the additional witnesses until the eve of trial constituted a willful misuse of the discovery process. Hovsepian, through counsel, conceded that he had not previously produced the 142 pages of documents or disclosed the identity of the three additional witnesses, even though they were responsive to Raeisi-Nafchi's discovery requests. Hovsepian's counsel offered no explanation for the late production and disclosure.⁶ Further, as the trial court noted, the late disclosure of the additional witnesses deprived Raeisi-Nafchi of the opportunity to test their credibility, depose them, ask interrogatories, and otherwise prepare to examine them for trial. On this record, the trial court did not abuse its discretion in granting the motion in limine. (See, e.g., *Karlsson v. Ford Motor Co.*, *supra*, 140 Cal.App.4th at p. 1219 [evidence sanctions appropriate against defendant based on pattern of discovery abuse, including failure to produce person most knowledgeable]; *Vallbona v. Springer* (1996) 43 Cal.App.4th 1525, 1545 [evidence sanction affirmed; defendants initially failed to respond to request for documents pertaining to whether they had sought independent review board approval for their laser procedure, then claimed documents were stolen, then brought some documents to trial]; *Thoren v. Johnston & Washer*

⁶ On appeal, Hovsepian contends that "[c]ounsel for [Hovsepian] argued that the deposition of Hovsepian did not occur until a week before trial and it was not until then that the documents were located." As described above, although counsel explained that he had produced the documents in response to Hovsepian's deposition notice, which deposition occurred on July 18, 2017, counsel never asserted that Hovsepian had not previously located the documents.

(1972) 29 Cal.App.3d 270, 274 [trial court properly precluded witness from testifying because plaintiff willfully omitted witness's name in answer to interrogatories].)

IV. DISPOSITION

The judgment is affirmed. Plaintiff Elyas Raeisi-Nafchi is entitled to recover costs on appeal.

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KIM, J.

We concur:

RUBIN, P. J.

BAKER, J.